THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 96-0013

ISSUE: Is it possible for an attorney-client relationship to be formed with an attorney who answers specific legal questions, through media available to the public or a segment of the public, when the questions are posed by persons with whom the attorney has not previously established an attorney-client relationship?

DIGEST: Normally, under circumstances when the public or a segment of the public is present, an attorney-client relationship will not be formed when an attorney answers specific legal questions posed by persons with whom the attorney has not previously established an attorney-client relationship. By taking care when answering specific legal questions in such a setting, particularly questions outside the attorney's area of expertise, an attorney can ensure that the persons posing the questions do not have a reasonable expectation that an attorney-client relationship has been formed or that their communications are confidential.

AUTHORITIES INTERPRETED: California Evidence Code sections 951, 952.

STATEMENT OF FACTS

As part of an effort to recognize Law Day, a local radio station invites a criminal defense attorney (Attorney) to answer legal questions posed by the station's listeners. Attorney agrees to appear without compensation and answer questions "live and on the air." During the special radio talk show commemorating Law Day, listeners ask questions involving criminal law as well as a variety of other legal topics. Several times during the radio program it is announced on the air that all calls are being screened by the radio station's staff, that callers should not expect their conversations with Attorney or the radio staff to be held in confidence, and that the "on the air" legal information provided is not intended to be a substitute for callers hiring their own lawyers to advise them about personal legal matters. Callers do not provide their full names on the air. They are pre-screened by the radio station's non-attorney staff, in part to identify and showcase matters of general interest to the listening audience. The screeners also announce to each caller that she or he should not expect confidentiality in the discussion with Attorney. Despite the screener's confidentiality disclaimer and the periodic announcements during the course of the program, specific information about the caller's identity and legal issue is sometimes disclosed to the screener.

One of the questions posed involves a landlord-tenant matter. In an attempt to be as helpful as possible, and relying on law school training and information garnered over the years, Attorney provides the caller with a generalized answer rather than one directly addressing the caller's specific question. Following the answer, Attorney points out that the question is outside his area of expertise, and that the caller should select and consult an attorney who practices in the field of landlord-tenant law.

In response to another caller's question about a probate matter, Attomey again provides a generalized answer. The answer provided, however, is incorrect and misstates the law. Unaware of the incorrect answer, Attorney again cautions the caller that the question is outside his area of legal expertise and suggests that the caller select and consult with an attorney who practices in the area of probate law.

In both situations, Attorney is answering questions from callers with whom he has not previously established an attorney-client relationship.[1/] The following discussion considers some of the various implications and potential professional responsibility issues involved in the aforementioned situations.

DISCUSSION

I. Background

The courts and the legal profession have acknowledged that, despite the number of practicing attorneys, a large segment of the population is without access to competent, affordable, legal services. Notwithstanding that both legal services organizations and attorneys, in general, provide *pro bono* representation to thousands of individuals, this problem continues to proliferate. Partly in response to this need for increased access to competent legal counsel, a number of methods have emerged for providing specific legal information to greater numbers of people about their legal rights and responsibilities. For example, it is common for attorneys to answer legal questions posed by persons who are strangers to them and who may have submitted the questions in-person, or through newspapers, magazines, radio call-in programs or other forms of media. Sometimes the questions are phrased so as to disclose specific facts about the person's problem and request specific responses. Other times, the questions are posed more generally as hypotheticals. The Committee has been asked to provide an opinion about the potential issues involving an attorney's professional responsibilities that may arise from engaging in these methods for delivering legal services by reference to factual settings presented above.

II. Formation of an attorney-client relationship

Evidence Code section 951 broadly defines "client" for purposes of the attorney-client privilege as "a person or entity who, directly or through an authorized representative, consults a lawyer for the purposes of retaining the lawyer or securing legal service or advice from him in his professional capacity." Evidence Code section 952 defines "confidential communication between client and lawyer" to mean: "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, *discloses the information to no third persons other than those who are present to further the interest of the client in the consultation . . .*" (Emphasis added.)

Under the specific facts presented and as discussed below, the Committee believes that although the callers are consulting Attorney for the purpose of securing legal advice about a specific legal problem, the radio program's format does not create a reasonable expectation that the caller is forming an attorney-client relationship with Attorney. In our opinion it is not reasonable to believe that the discussion of legal issues with an attorney creates an attorney-client relationship if others are present, if they are able to hear the entire discussion, and if they are not present to further the interests of the potential "client" in the discussion (see Evid. Code, §§ 951, 952).

An attorney-client relationship can be created by express or implied agreement. Except when created by court appointment, the attorney-client relationship may be found to exist based on the intent and conduct of the parties and the reasonable expectations of the potential client. (See, e.g., *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 281, fn. 1 [36 Cal.Rptr.2d 537] [discussing the factual nature of the determination of whether an attorney-client relationship has been formed]; *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 565 [237 Cal.Rptr. 528] [the determination that an attorney-client relationship exists ultimately is based on the objective evidence of the parties' conduct]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954 [226 Cal.Rptr. 532] [absent some objective evidence of an agreement to represent plaintiffs, it is not sufficient that plaintiffs "thought" defendant was their attorney].)

[1/] There are many other situations in which attorneys provide information on legal topics to the public including, for example, through legal texts designed to inform the non-lawyer, and public commentary on court decisions and other matters of public interest that does not involve answering specific questions from the public. These areas are beyond the scope of this opinion.

Whether an implied in fact attorney-client relationship has been created with the caller is of paramount importance because, if it has been formed, Attorney must comply with all of the professional responsibilities inherent in that relationship. Among the duties that arise are confidentiality, loyalty and competency.[2/]

A. The provision of legal advice and the formation of an attorney-client relationship

When a potential client consults an attorney and the attorney renders legal advice, a fiduciary relationship is established. (*Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39-40 [154 Cal.Rptr. 22]; *Beery v. State Bar* (1987) 43 Cal.3d 802, 811 [226 Cal.Rptr. 532].) Merely because an attorney renders legal advice to an individual on a *pro bono* basis does not relieve an attorney of his or her professional responsibilities.[3/] Legal advice has been defined as the act which "require[s] the exercise of legal judgment beyond the knowledge and capacity of the lay person." (*In re Anderson* (1987) 79 B.R. 482, 485 (Bankr. S.D. Cal.). While somewhat imprecise, other cases suggest legal advice includes making a recommendation to the potential client about a specific course of action to follow.[4/] Consistent with this definition, it is this Committee's opinion that it is not legal advice for Attorney merely [to give a generalized answer to the callers' specific legal questions or] to advise callers to consult with another attorney regarding the their specific legal rights.

The inquiry as to whether an attorney-client relationship has been formed, however, does not end with the conclusion that Attorney did not render legal advice. As discussed below, an attorney-client relationship may also be found to have been formed when a prospective client has communicated confidential information or when a prospective client has otherwise formed a reasonable belief that an attorney-client relationship has been formed.

B. Confidential information and the formation of an attorney-client relationship

An attorney-client relationship may also be found to exist where a potential client has communicated confidential information to the attorney regardless of whether a fee agreement is signed, money is received or the attorney agrees to the representation. (*Perkins v. West Coast Lumber Co.* (1900) 129 Cal. 427 [62 P. 57]; *Miller v. Metzinger*, *supra*, 91 Cal.App.3d 31, 39-40; L.A. Cty. Bar Assn. Formal Opn. No. 449.) The California Supreme Court's discussion of *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132] (*Zimmerman*) in its decision in *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] (*SpeeDee Oil*), is instructive on this point. In *SpeeDee Oil*, the Supreme Court considered the issue of "whether an attorney-client relationship has reached a point where the attorney can be subject to disqualification for a conflict of interest." (*SpeeDee Oil*, *Id.* at p. 1147.) In considering this issue, the Supreme Court first stated that "the primary concern is whether and to what extent the attorney acquired confidential information." (*Id.* at p. 1148) The Supreme Court then discussed *Zimmerman* as follows:

> *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132] concerned a woman's telephone contact with an attorney, Kenneth Gack, to discuss representation for post dissolution proceedings. . . . In her 1992 motion to disqualify her ex-husband's attorney, the woman stated that she had a 20-minute telephone consultation with Gack in November 1989. She said she had explained her case fully to Gack. She also said that Gack had provided initial impressions and opinions before

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[2/] (Business & Professions Code section 6068, subdivision (e); Rules 3-110, 3-300 and 3-310 of the California Rules of Professional Conduct.)

[3/] An attorney's failure to provide agreed services to a *pro bono* client supported the imposition of discipline. (*Segal v. State Bar* (1988) 44 Cal.3d 1077 [245 Cal.Rptr. 404].)

[4/] For example, determining when a debtor should file a bankruptcy petition was deemed to be "legal advice." (*In re Gabrielson* 217 B.R. 819, 824 [Bankr.D.Az. 1998].) See also, *In re Glad* 98 B.R. 976, 978 [Bankr.9th Cir. 1989] [advising a debtor to file a chapter 11 bankruptcy petition]; and *In re Kaitangian* 218 B.R. 102, 112 [Bankr.S.D. Cal. 1998] [explaining or discussing the impact of a bankruptcy filing on the dischargeability of debts] .

> recommending that she contact someone with family law expertise. For his part, Gack said he had no notes and no recollection of any conversation. [Citation.]
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> The Court of Appeal affirmed the trial court's denial of the motion to disqualify the ex-husband's attorney. In doing so, the court properly focused on whether the woman established, directly or by reasonable inference, that in the telephone conversation Gack acquired confidences related to the postdissolution proceedings. [Citation.] Several factors contributed to the court's conclusion that the woman failed to show Gack acquired confidential information. [Fn. omitted.]
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> As *Zimmerman* stated, if Gack provided any representation at all, "it was clearly work of a preliminary and peripheral nature. [Citation.] . . . He performed no work [and instead] referred her to an attorney with 'domestic expertise.'" [Citation.] Also, while Gack may have offered his initial impression and opinion in response to the woman's "outline" of her case, "he obviously was not called upon to formulate a legal strategy and, by the very limited nature of his contact with [the woman], could not have gained detailed knowledge of the pertinent facts and legal principles. [Citation.]" [Citation.] . . . As a result, the court found it unlikely that Gack possessed any material confidential information.

(*Id*. at pp. 1148-1149.)

Our hypothetical facts are similar to the facts the Supreme Court emphasized in its discussion of *Zimmerman*, and we reach a similar conclusion on the issue of whether either callers' communication of confidential information could be deemed to have created an attorney-client relationship. Moreover, to the extent our facts differ (because, for example, our facts involve a telephone conversation broadcast publicly over the radio with the prior knowledge of the caller), those differences weigh in favor of finding that no caller reasonably could expect that an attorney-client relationship had been formed with Attorney.

C. A potential client's "reasonable" belief and the formation of an attorney-client relationship

Although there has been no payment of fees or communication of confidential information in the situation presented, there are a number of other factors present in the hypotheticals that might bear on the reasonableness of a "client's" belief that an attorney-client relationship has been formed.[5/] For example, weighing in favor of the formation of an attorney-client relationship are the following: (1) the callers are offered the opportunity to pose "legal questions" to Attorney, who will provide "answers" to those questions; (2) the callers accept the offer by calling in to the radio program and, in some cases, despite the disclaimers broadcast or given by the screener, give specific information about their identity and legal problems to the screener; (3) the callers present personal legal problems to Attorney; (4) the callers receive an answer that includes a recommendation to seek further legal advice from which they may reasonably perceive that their stated problems constitute a bona fide legal concern warranting further action.

On the other hand, the following factors weigh against the formation of an attorney-client relationship in these situations: (1) Periodically during the course of the program there are announcements that callers cannot expect any confidentiality; (2) moreover, the screener tells each caller, prior to receiving any facts about the caller, that the caller can not reasonably expect any confidentiality, privacy, or privilege in conversing "on the air" with Attorney; (3) as a result of the periodic on-the-air announcements, callers may be deemed to know that only general legal information is being provided that is "not intended to be a substitute for callers hiring their own lawyers" for legal advice regarding their specific problem; (4) consistent with the periodic announcements, the answers provided to the callers are, in fact, merely a "generalized answer" and not particularized to meet the needs of the callers' specific questions; (5) the suggestion that the callers seek

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[5/] One factor bearing on the formation of an attorney-client relationship is the payment of legal fees. (*Strasbourger Pearson Tulcin Wolff, Inc. v. Wiz Technology, Inc.* (1999) 69 Cal App 4th 1399, 1403 [82 Cal.Rptr.2d 326]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532, 535].) Thus, if Attorney received compensation to provide such advice, the payment might constitute an additional, although not necessarily a conclusive factor to consider in determining whether an attorney-client relationship had been formed with the caller.

out a more knowledgeable attorney to advise them on particular matters conveys Attorney's intent to not represent the caller.

Since the formation of an attorney-client relationship is viewed from the perspective of the potential client, the attorney must avoid, by conduct or the nature of the advice given, suggesting that Attorney represents the individual's specific interests. (*Miller v. Metzinger*, *supra*, 91 Cal.App.3d 31, *Bernstein v. State Bar* (1990) 50 Cal.3d 221 [266 Cal.Rptr. 625].) The disclaimers given by the screener, radio station and Attorney militate against the creation of the attorney-client relationship with any member of the public because the callers could not reasonably believe that Attorney represents the caller's individual interests.

As already noted at the beginning of this Discussion, it is not reasonable for a prospective client to believe that the discussion of legal issues with an attorney creates an attorney-client relationship if others are present, if they are able to hear the entire discussion, and if they are not present to further the interests of the potential "client" in the discussion (see Evid. Code, §951). To avoid receiving specific information from the caller of a confidential nature, however, it is advisable that Attorney emphasize to the screener the importance of first notifying the caller that no attorney-client relationship will be formed with Attorney and that Attorney is not providing legal advice about any specific legal problem the caller may have.

Further, the caller's state of mind alone, unless reasonably induced by Attorney's representations or conduct, is not sufficient to create an attorney-client relationship unilaterally. Thus, equally important is the understanding that an attorney can avoid the creation of an attorney-client relationship by words, conduct or other explicit action. (*People v. Gionis* (1995) 9 Cal.4th 1196 , 40 Cal.Rptr.2d 456, [attorney told defendant that he could not represent the defendant in advance of discussion of defendant's legal problem]; see also *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532, 535].)

Although as noted, attorneys advising members of the public about legal issues with varying degrees of complexity can avoid the creation of an attorney-client relationship through explicit words or actions, it is advisable for Attorney to refrain from offering other than generalized legal advice, decline to express an opinion about matters outside his area of legal expertise, and caution callers to consult with counsel regarding their individual rights and responsibilities. In all situations, attorneys should exercise care to avoid either the inadvertent formation of an attorney-client relationship or providing information or advice that is, in any way, inaccurate or misstates the law.

CONCLUSION

Attorneys should be encouraged to volunteer their time to provide information to the public about legal issues involving their legal rights and responsibilities. Although the situation considered in this opinion demonstrates that there are potential issues involving attorneys' professional responsibilities, it also suggests that attorneys who exercise care when providing legal answers to the public can avoid the inadvertent formation of attorney-client relationships or creating the expectation in a member of the public that an attorney-client relationship has been formed.

For example, under the facts and circumstances of the situations discussed in this opinion, there seems to be no basis for a caller reasonably to expect that she has formed an attorney-client relationship through the discussions and opinions publicly shared with Attorney over the radio. The question of whether an attorney-client relationship has been formed is factual in nature and must be examined in light of the totality of the circumstances.

The foregoing discussion demonstrates that attorneys advising members of the public about legal issues with varying degrees of complexity should be aware that there may be potential risks involved, particularly when offering advice outside their area of legal expertise. Thus, attorneys should be sensitive to the circumstances surrounding their advice to the public about legal questions and exercise care to avoid the inadvertent and unintended formation of an attorney-client relationship or providing information that misstates the law. Accordingly, both attorneys and the public will benefit from the dissemination of information about the public's legal rights and responsibilities, the public will have

greater access to the justice system, and attorneys contributing their services on a *pro bono* basis can do so with confidence that they have complied with their professional responsibilities.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.